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December 22, 2008

Corbin Davis

Clerk of the Court

Michigan Supreme Court

P.O. Box 30052

Lansing, MI 48909

**RE: ADM File No. 2007-41
Proposed Amendment of Rule 2.112 of the Michigan Court Rules**

Dear Clerk Davis:

At its December 16, 2008 meeting, the Executive Committee of the State Bar of Michigan considered the above rule amendment published for comment. After considering recommendations from its Civil Procedure and Courts Committee, the Executive Committee unanimously voted to oppose the proposed amendment as published for comment but to offer an alternative that we believe better achieves the intended purpose.

In its analysis, the Committee questioned the need for an amendment to MCR 2.112 to achieve consistency with MCL 600.2957 and MCL 600.6304 as amended by 1995 PA 249, as the rule already clearly specifies to which actions subrule (K) notice provisions apply, i.e., those covered by MCL 600.2957 and MCL 600.6304.

If amendments are adopted to provide further clarification, however, the Committee suggests deleting the words “for personal injury, property damage, and wrongful death” from current rule. The proposal would read:

Rule 2.112 Pleading Special Matters

K. Fault of Nonparties; Notice.

(1) Applicability. This rule applies to actions ~~for personal injury, property damage, and wrongful death~~ to which MCL 600.2957 and MCL 600.6304, as amended by 1995 PA 249, apply.

Note: this provision should probably refer to “This subrule” or “Subrule (K)”. As written, it seems to say that MCR 2.112 itself is limited to actions covered by those statutes.

There was also concern expressed that the staff comment to the proposed rule may inadvertently and inappropriately expand application of comparative fault. The staff comment to the proposal says that the amendment would “clarify that the comparative negligence provisions apply to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death.” This is incorrect. Comparative negligence principles do not apply to certain kinds of actions for personal injury, property damages or wrongful death. *See, e.g., Hill v Sacka, 256 Mich App 443 (2003) [MCL 287.351;*

“dog-bite” statute]; *Dept of Transportation v Christensen*, 229 Mich App 417 (1998) [MCL 257.719(1); *vehicle height limitations*].

Although staff comments disclaim status as an authoritative construction by the Court, they are frequently referred to in interpreting rules. *E.g.*, *Woodward v Custer*, 476 Mich 545, 559 n15 (2006); *People v Miles* 454 Mich 90, 97-98 (1997). The staff comment to this proposal could easily be cited to support the view that comparative negligence principles apply to actions where they do not.

We appreciate the opportunity to offer this position and explanation for the Court’s consideration. Please contact me with any further questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janet Welch".

Janet Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Edward Pappas, President